IN THE

Supreme Court of the United States

October Term, 1975.

No. 75-1791.

ARTHUR ANDERSEN & CO.,

Petitioner,

v

MITCHELL A. KRAMER and DAVID C. HARRISON,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

OLIVER C. BIDDLE,
MATTHEW M. STRICKLER,
RICHARD Z. FREEMANN, JR.,
20th Floor, United Engineers Building,
30 South 17th Street,
Philadelphia, Pennsylvania. 19103

CHARLES W. BOAND,
135 South LaSalle Street,
Chicago, Illinois. 60603

Attorneys for Petitioner.

Of Counsel:

BALLARD, SPAHR, ANDREWS & INGERSOLL,
20th Floor, United Engineers Building,
30 South 17th Street,
Philadelphia, Pennsylvania. 19103

WILSON & MCILVAINE,
135 South LaSalle Street,
Chicago, Illinois. 60603

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

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CITATIONS.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

This reply brief is submitted by petitioner Arthur Andersen & Co. in support of its Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit and in response to the Brief in Opposition thereto filed by respondents.

I. Respondents Misstate Petitioner's Position, as Well as the Position of the Second Circuit on the Appealability of Class Orders.

Respondents erroneously assert that it is "petitioner's theory" that this Court's decision in *Eisen IV* (417 U. S. 156 "mandates the Courts of Appeals to review *all* interlocutory class certification orders if they are immediately appealed . . ." under 28 U. S. C. § 1291 (Brief in Opposition at page 10; emphasis added). To the contrary, the Petition addresses only the holding of the Third Circuit Court of Appeals, in this and other cases, that a decision to certify a class may *never* be appealed under 28 U. S. C. § 1291 regardless of whether it meets the criteria laid down by this Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949).

Moreover, respondents erroneously imply that there is no difference between the Second and Third Circuits in the treatment afforded to class orders appealed under 28 U. S. C. § 1291. *Sanders v. Levy, et al.*, – F. 2d – (2d Cir., Nos. 743, 744, 745, June 30, 1976), reprinted as Appendix C, not only holds that a class order requiring the defendant investment company to bear the costs associated with the identification of class members was appealable under 28 U. S. C. § 1291 "because it fits squarely within the col-

lateral order doctrine of *Cohen v. Beneficial Loan Corp.*" (Appendix C, page 8), but also that it was proper to review the district court's class action ruling on the question of manageability because the order containing that ruling was properly before the Court on the issue of identification costs, and because there was sufficient "overlap" in the factors relevant to both issues to warrant the Court's exercise of plenary authority (Appendix C, page 17). Considering the identity of "overlap" between petitioner's appeal on the issue of disqualification-of-counsel and its appeal on the issue of adequacy-of-class-representation, the parallel to *Sanders* is irresistible.

II. None of the Facts Upon Which Andersen Bases Its Petition Are in Dispute.

The brief in opposition also erroneously suggests that Andersen is asking this Court to engage in the process of making factual determinations from a contested record, and that this Court should reverse findings of fact of the District Court and the Court of Appeals.

First, the Brief in Opposition does not challenge the accuracy of a single, solitary fact asserted in the Petition. This is so, of course, because the facts established are based upon the testimony of the respondents themselves and their counsel. Accordingly, the facts necessary for disposition of the issues are not in dispute—this Court may properly rely on the uncontested facts set forth in Andersen's Petition.

Second, a grant of the Petition would not require this Court to contradict any fact found either by the District Court or by the Circuit Court since both Courts avoided coming to grips with any of the factual bases underlying petitioner's appeals—the District Court by assuming (without deciding) "the impropriety of [respondents] motives

in instituting the action" (Appendix B, page A21), and the Circuit Court by refusing to review Petitioner's appeal challenging Kramer's qualifications to act as class representative and by resting its decision on appearances of impropriety in Petitioner's appeal challenging his qualifications to act as class counsel (Appendix A, pages A5, A8).

III. Conclusion.

Because the questions presented herein are collateral to the merits and of grave and immediate importance to the bar and judiciary alike, Andersen's Petition should be granted.

July 23, 1976.

Respectfully submitted,

Oliver C. Biddle,
Matthew M. Strickler,
Richard Z. Freemann, Jr.,
20th Floor, United Engineers Building,
30 South 17th Street,
Philadelphia, Pennsylvania. 19103

Charles W. Boand,
135 South LaSalle Street,
Chicago, Illinois. 60603
Attorneys for Petitioner.

Of Counsel:
Ballard, Spahr, Andrews & Ingersoll,
20th Floor, United Engineers Building,
30 South 17th Street,
Philadelphia, Pennsylvania. 19103

Wilson & McIlvaine,
135 South LaSalle Street,
Chicago, Illinois. 60603

APPENDIX C.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 743, 744, 745—September Term, 1975.

(Argued May 5, 1976 Decided June 30, 1976.)

Docket Nos. 75-7608, 75-7610, 75-7611

IRVING SANDERS,
Plaintiff-Appellee,

—against—

LEON LEVY, et al.,
Defendants-Appellants.

EGON TAUSSIG,
Plaintiff-Appellee,

—against—

SIDNEY M. ROBBINS, et al.,
Defendants-Appellants.

MICHAEL SHAEV and RITA SHAEV,
Plaintiffs-Appellees,

—against—

ERIC HAUSER, et al.,
Defendants-Appellants.

Before:

HAYS and MULLIGAN, *Circuit Judges*, and
PALMIERI, *District Judge*. *

* Edmund L. Palmieri, United States District Judge, Southern District of New York, sitting by designation.

Appeal from an order of the Hon. Thomas F. Griesa, *Judge*, United States District Court for the Southern District of New York, holding the suit to be properly maintainable as a class action under Rule 23(b)(3), Fed. R. Civ. P., and directing that the defendant mutual investment fund bear substantial costs of extracting the names and addresses of the class members from computer tapes.

Affirmed as to class action designation. Reversed as to allocation of identification costs.

GERALD GORDON, New York, New York (Weisman, Celler, Spett, Modlin & Wertheimer, New York, New York, Milton C. Weisman of Counsel), *for Defendant-Appellant Oppenheimer Fund, Inc.*

LEON H. TYKULSKER, New York, New York (Guggenheimer & Untermyer, New York, New York, Richard P. Ackerman, of Counsel), *for Defendants-Appellants Oppenheimer Management Corp., Oppenheimer & Co., Leon Levy and Jack Nash.*

JOHN F. DAVIDSON, New York, New York (Thacher, Proffitt & Wood, New York, New York, Daniel E. Kirsch, of Counsel), *for Defendants-Appellants Edmund T. Delaney and Emanuel Celler.*

DONALD N. RUBY, New York, New York (Wolf Popper Ross Wolf & Jones, New York, New York, Robert Kornreich, of Counsel), *for Plaintiffs-Appellees.*

PALMIERI, *D. J.*:

Plaintiffs-appellees (plaintiffs) seek to maintain this action on behalf of certain present and former stockholders of Oppenheimer Fund, Inc. (the Fund), an investment company registered under the Investment Company Act of 1940, 15 U. S. C. § 80a-1 *et seq.* This is an appeal under 28 U. S. C. § 1291 from an interlocutory order holding the suit to be properly maintainable as a class action under Rule 23(b)(3), Fed. R. Civ. P., and directing the defendant-appellant (defendant) Fund to bear substantial costs in identifying the names and addresses of the class members so that plaintiffs can send them the initial notice of the pending action as required by Rule 23(c)(2), Fed. R. Civ. P.

When the motion for class determination was made, there were over 67 million shares of the Fund outstanding held by approximately 173,000 shareholders. Of the approximately 121,000 present or former shareholders who constitute the class designated by the plaintiffs, about 103,000 remain shareholders and 18,000 have sold their shares. The information needed by plaintiffs for the preparation of the notice to the members of the class, particularly the names and addresses of the class members, is contained in magnetic computer tapes kept by the transfer agent of the Fund. The extraction of this information from the tapes would require, in addition to the usual processing, the design of new computer programs. The cost of accomplishing this task was estimated by the transfer agent to be $16,580 as of October 10, 1973.

On each of the issues presented, identification costs and designation as a manageable class action, we must first decide if the issue is reviewable on appeal and, if so, then determine if the district court's decision should be upheld. Since we find that our treatment of the identification costs matter affects the designation question, we discuss the identification costs matter first.

The Allocation of Identification Costs

The order requiring the Fund to bear the identification costs is appealable because it fits squarely within the collateral order doctrine of *Cohen v. Beneficial Loan Corp.*, 337 U. S. 541 (1949). The requirements of that doctrine are essentially twofold: first, the decision appealed from must not be "tentative, informal or incomplete," 337 U. S. at 546, but rather it must conclusively settle a party's claim; second, the decision must involve a collateral matter that can be reviewed apart from the merits of the case but which cannot be effectively reviewed on appeal from the final judgment. In *Eisen v. Carlisle & Jacquelin (Eisen IV)*, 417 U. S. 156 (1974), the Supreme Court faced the question whether this court had jurisdiction in *Eisen v. Carlisle & Jacquelin (Eisen III)*, 479 F. 2d 1005 (2d Cir. 1973) when we reviewed the district court's order imposing notice costs on the defendants. The Supreme Court decided that the order was appealable because it was "'a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it.'" 417 U. S. at 172, *quoting Cohen, supra*, 337 U. S. at 546-47. *See also, General Motors Corp. v. City of New York*, 501 F. 2d 639, 647 (2d Cir. 1974). We find this question of appealability controlled by *Eisen IV*.

We turn next to the merits of the order allocating identification costs. Rule 23(c)(2), Fed. R. Civ. P., provides in relevant part:

> In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.

Since this is a class action brought under subdivision (b)(3) of the rule, namely, one in which the court below found that the questions of law or fact common to the members of the class predominate over any questions affecting only the individual members, and that the class action was superior to other available methods, individual notice of the action must be sent to all class members who can be identified by name and address through a reasonable effort. *Eisen IV*, 417 U. S. at 173-77. The cost of such notice must be borne in the first instance by plaintiff. *Id.*, 417 U. S. at 177-79; *Eisen III*, 479 F. 2d 1005, 1009 (2d Cir. 1973); *Eisen II*, 391 F. 2d 555, 568 (2d Cir. 1968). The authorities just cited enunciate the views of the Supreme Court and this court that, absent special circumstances, if the plaintiff does not accept this expense, the class action cannot be maintained. In the usual case, defendants may not be compelled to provide financial support for a class action against themselves.

> Where, as here, the relationship between the parties is truly adversary, the plaintiff must pay for the cost of notice as a part of the ordinary burden of financing his own suit.

Eisen IV, 417 U. S. at 178-79.

The possibility that plaintiff may not be required to defray the cost of notice is still an open question in some cases. The Supreme Court declined to foreclose the possibility in "situations where a fiduciary duty pre-existed between the plaintiff and defendant, as in a shareholder derivative suit." *Eisen IV, supra*, 417 U. S. at 178. In addition to the derivative suit, we have suggested that there may be other similar cases in which justification might be found for holding that a representative plaintiff is not obligated to defray the cost of notice, citing "a case

where a public utility corporation which regularly sends monthly bills to its current customers has been held to have overcharged its customers and the class suit is brought to compel a refund." *Eisen III*, 479 F. 2d 1005, 1009 n. 5 (2d Cir. 1973). The district judge does not appear to have pursued this line of analysis and the plaintiffs have mentioned it only in passing.

Assuming that there may be cases where the imposition of notification costs on the defendant may be justified, we do not think this is such a case. The defendant Fund is not a public service monopoly with the responsibilities incumbent upon such an entity, and no finding of liability has yet been entered against it. The Supreme Court in *Eisen IV* did not attempt to elucidate the exceptional case in which a representative plaintiff might be relieved of this burden. Indeed, it did not unequivocally state that there was such a case. It did speak of the shareholder derivative suit but that apparently was by way of analogy since the derivative suit is not a class action, though possibly akin thereto.[1] The Supreme Court also described *Eisen IV* as a case where "the relationship between the parties is truly adversary." 417 U. S. at 178. Possibly this was intended to contrast it with a derivative suit where the corporation, though a nominal defendant, has interests closely aligned with the plaintiff and indeed would be the beneficiary of any recovery. The equities in favor of imposing some costs on the corporation in that situation are obvious. But the Supreme Court more likely had in mind an arms-length relationship unencumbered by fiduciary duties. The relationship between the plaintiffs and the Fund is probably not "truly adversary" in the *Eisen IV*

1. See *Developments in the Law, Multiparty Litigation in the Federal Courts*, 71 Harv. L. Rev. 874, 943 (1958); Meyer, *The Social Utility of Class Actions*, 42 Brooklyn L. Rev. 189, 190-91 (1975).

sense. Although the Fund is not in the position of the corporation in a derivative suit,[2] we may assume it had fiduciary duties to the purchases of its shares. See *Dolgow v. Andersen*, 43 F. R. D. 472, 498-99 (E. D. N. Y. 1968). But the relationship between the plaintiffs and the Fund is not non-adversarial in a manner which requires an exception to the *Eisen IV* rule on notification costs, but in a manner that makes it totally improper to impose costs on the Fund: the Fund is not a party to the class action claims.[3] No recovery is sought from the Fund in the class action. The plaintiffs have been careful to exclude the Fund itself from all allegations of wrong-doing and to seek recovery only from its directors, its managing company and the broker-dealer firm that controls the manager. Indeed, the Fund appears to have been named as a defendant only for purposes of the derivative claims which are not of concern here. Since the Fund has no direct interest in the outcome of the class action claim, it is too remotely involved to have notification costs imposed upon it.

Furthermore, we do not think these costs could properly be imposed on the other defendants. Even if we assume that these defendants—the directors of the Fund, its manager, and the firm that controlled the manager—

2. Each of the three consolidated suits contains two counts—one a derivative and one a class action. The order on appeal deals only with the latter, and we are not here concerned with the derivative claims. Furthermore, the Fund would not directly benefit from a recovery by the plaintiffs.

3. The dissent apparently overlooks the fact that the costs were imposed on the Fund which is not a party to the class action claims. *Eisen IV*, *supra* at 178, makes an exception to the usual rule that the representative plaintiff must bear the cost of notice "where a fiduciary duty pre-existed between the *plaintiff* and *defendant* . . ." (emphasis added). We may not assume that non-class member shareholders would approve of the Fund underwriting these expenses for the benefit of other shareholders.

had fiduciary duties to the plaintiff shareholders, that would be insufficient in our opinion to warrant imposition of notification costs on them on the facts of this case. Many of the considerations pointed to in justification for shifting the costs, see *Dolgow v. Andorsen, supra,* 43 F. R. D. at 498-500; *Eisen v. Carlisle & Jacquelin,* 52 F. R. D. 253, 264-70 (S. D. N. Y. 1971), have been shown to be inappropriate. The district court may not weigh the merits and cite the strength of a plaintiff's case as justification.[4] The result in *Eisen IV* leaves no doubt that the ability of a defendant to bear the costs and the fact that, if it does not, the suit will have to be discontinued, are to be given little or no weight. The public interest in enabling the adjudication of claims that could not be maintained in any other form and in having remedial statutes enforced is sharply offset by the danger, all too frequently realized, of large settlements paid irrespective of the merits of the claim in order to avoid the disastrous expenses of litigation. *Eisen III, supra,* 479 F. 2d at 1019. Even the contention that the defendant has an interest in obtaining the effects of res judicata against all members of the class often rings untrue. If the class action proceeds, the defendant may pay large sums in defending claims that might not otherwise have been

4. We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.

Eisen IV, supra, 417 U. S. at 177. We have stated the matter more broadly:

> But neither in amended Rule 23 nor in any other rule do we find provision for any tentative, provisional or other makeshift determination of the issues of any case on the merits for the avowed purpose of deciding a collateral matter such as which party is to be required to pay for mailing, publishing or otherwise giving any notice required by law.

Eisen III, supra, 479 F. 2d at 1015.

brought due to the limited interest of the individual plaintiffs.[5] In sum, we perceive no special circumstances in this case that would warrant shifting the costs of notification from the plaintiffs to any of the defendants. We have suggested before that the vindication of valid class claims not maintainable under Rule 23(b)(3) or otherwise is a matter for Congress. *Eisen III,* 479 F. 2d at 1019.

The justification that the district court found for imposing some costs on the defendant Fund was twofold. First, it found the expense was "relatively modest," apparently in relation to the assets of the Fund which exceeded $500,000,000. This is an inappropriate consideration in the determination of the incidence of notice costs, even if the costs force the plaintiffs to discontinue as in *Eisen IV*. The second reason given was that "it is defendants who are seeking to have the class defined in a manner which appears to require the additional expense." This bears some analysis. Plaintiffs defined the class as all persons who purchased shares of the Fund during the period March 28, 1968 to April 24, 1970. Discovery then revealed that this class consisted of approximately 121,000 persons, 103,000 of whom were still Fund shareholders, and that the cost of the required computer operations to extract the names and addresses of the class members from the lists of past and present Fund shareholders would be approximately $16,580. Plaintiffs then sought to redefine the class to exclude the 18,000 persons included in the original class who no longer hold Fund shares, and to send the required notice by inserting it in a regular mailing to all present Fund shareholders. The defendants objected to the exclusion of the 18,000 persons, presum-

5. *See* Note, *Class Actions Under Federal Rule 23(b)(3)—The Notice Requirement,* 29 Md. L. Rev. 139, 155 (1969). This is true of the instant case where the interests of the class members are said to range from $2.00 to $24.00.

ably because it would limit the res judicata effect of the suit. The district court reached the same conclusion but for a different reason, holding that these persons could not be excluded because to do so "would involve an arbitrary reduction in the class."[6] The class as originally defined was found to constitute the proper class for reasons unrelated to the interests of the defendants. It would thus be inconsistent to say that it is a proper class only if the defendants pay the costs. The two issues are distinct.

The defendants also opposed sending the notice to the 68,000 shareholders who are not class members, expressing concern that such a mailing could lower investor confidence and trigger a wave of redemptions. The district court did not pass on the validity of this concern; it merely noted that the concern was obviated by having the defendant cull the non-members from the lists. However, there is evidence in the record to substantiate the concern. Plaintiffs assert that the Fund shareholders have been advised of the nature and pendency of this suit 13 times since 1970 in proxies, prospectuses and annual reports. But we think that notice of that type—usually several paragraphs in a footnote written by management and with a strong denial of merit—would have a far milder impact than a separate communication (though mailed with other papers) composed by the plaintiffs, giving a detailed explanation of the claims and without a denial of merit, particularly when the latter portends the imminent prosecution of a matter which the steady flow of prior notices had indicated was dormant if not defunct. In these circumstances, we think that the defendants concern was legitimate and the district court

6. The court found: "If the shareholders who purchased during the relevant period were misled into purchasing at inflated prices, then, as far as the present record shows, this problem affects those shareholders who have sold out just as much as those who happened to have retained their shares."

could not properly condition its abatement on defendants' shouldering of the notice costs. The identification costs cannot be viewed as additional expense necessitated by unreasonable or partisan demands on the part of the defendants.

Plaintiffs attempt to distinguish *Eisen III* and *Eisen IV* by asserting that the cost of identifying the members of a class is not a part of notifying those members. They further suggest that identification costs are akin to the expense borne in discovery which a district judge may in his discretion require a party to bear unless the party can show that it is unreasonable and oppressive, citing, *inter alia,* 8 C. Wright & A. Miller, *Federal Practice and Procedure,* § 2218 at 659 (1970), and 4A J. Moore, *Moore's Federal Practice* ¶ 33.20 (2d ed. 1975). However, we are of the opinion that the cost of obtaining the name and address to be affixed to the envelope does not differ in kind from the cost of printing the notice and of procuring, stuffing and posting the envelopes. Moreover, if the rules of discovery were applicable, it appears unlikely that they would require that defendants bear the identification costs here. Rule 33(c), Fed. R. Civ. P., designed to protect parties from burdensome interrogatories, provides:

> (c) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or

> ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

Under this rule, a party will not be required to perform burdensome extraction of information from sources that are available to the party seeking discovery. *See* 4A J. Moore, *Moore's Federal Practice* ¶ 33.20 at 33-103 (2d ed. 1975); *Tytel v. Richardson-Merrell, Inc.*, 37 F. R. D. 351 (S. D. N. Y. 1965); *Konczakowski v. Paramount Pictures, Inc.*, 20 F. R. D. 588 (S. D. N. Y. 1957). If the discoverer should proceed under one of the other rules governing discovery, the respondent could obtain a protective order under Rule 26(c) from "undue burden or expense." Nevertheless, we do not rely on this point since we find the discovery rules inapplicable.[7]

7. Our dissenting Brother sees Rule 34 as "more specifically designed to govern computerized information." This rule addresses itself to the production of data compilations for inspection or copying, not to the sorting or analysis of the data. Although the rule provides that the data compilation may be "translated, if necessary, by the respondent through detection devices into reasonably usable form," the concern appears to focus on putting the data into a form intelligible to the discoverer so he can then study or employ it. As the Advisory Committee Note to the 1970 amendment states,

> "[W]hen the data can as a practical matter be made usable by the discovering party only through respondent's devices, respondent may be required to use his devices to translate the data into usable form. In many instances, this means that respondent will have to supply a *print-out* of computer data."

48 F. R. D. at 527 (emphasis added). The task of culling relevant names and addresses from a long list, as confronts the parties here, is a distinctly different one from the production for inspection and copying with which Rule 34 is concerned. If "sophisticated electronic manipulation and analysis" becomes necessary, "the courts will have to become increasingly sensitive to problems of expense and the utilization of an opponent's computer assets." 8 C. Wright and A. Miller, Federal Practice & Procedure § 2218 at 659 (1970).

We turn next to the designation of the suit as a class action. The determination of the district court that the action met the requirements of Rule 23(b)(3) was discretionary. It is not appealable under the collateral order doctrine. In seeking to arrive at some standards by which to determine the appealability of such an order, we have developed a three-pronged test as set forth in *Herbst v. International Telephone & Telegraph Corp.*, 495 F. 2d 1308, 1312 (2d Cir. 1974), and refined in *Kohn v. Royall, Koegel & Wells*, 496 F. 2d 1094 (2d Cir. 1974), *General Motors Corp. v. City of New York*, 501 F. 2d 639 (2d Cir. 1974) and, most recently, in *Parkinson v. April Industries Inc.*, 520 F. 2d 650 (2d Cir. 1975). *See also, Handwerger v. Ginsberg*, 519 F. 2d 1339 (2d Cir. 1975). In *Parkinson*, we recognized the "renewed emphasis on the policies of finality" and indicated that only in "extraordinary circumstances" would exceptions to the final judgment rule be permitted. 520 F. 2d at 657-58. Although it may be a close question whether that three-prong test is satisfied here, we do not decide that question. We think we may properly review the class action designation because the order in which it was made is properly before us on another ground. Judge Friendly, in his concurrence in *Parkinson, supra*, 520 F. 2d at 660, suggested that this exception should be made even if appeals from the grant or denial of class action designation are allowed only under the certification procedures of 28 U. S. C. § 1292(b). There is sufficient overlap in the factors relevant to both issues to warrant our exercising plenary authority over this appeal. *Eisen IV, supra*, 417 U. S. at 172; *Hurwitz v. Directors Guild of America, Inc.*, 364 F. 2d 67 (2d Cir.), *cert. denied*, 385 U. S. 971 (1966). *See San Filippo v. United Bhd. of Carpenters & Joiners*, 525 F. 2d 508 (2d Cir. 1975); *General Motors Corp. v. City of New York*, 501 F. 2d 639, 648

(2d Cir. 1974); 9 J. Moore, *Moore's Federal Practice* ¶ 110.25[1], at 272-73 (2d ed. 1975).

Turning to the merits of the class action designation we find that the granting of class action status was proper. As Judge Griesa found, the requisite numerousness is present and common questions of law and fact predominate over any questions affecting only the individual members of the class. Moreover, we cannot, at this stage of the litigation, support defendants' claim of unmanageability. They contend that proof of liability and damages "may well involve millions of individual computations," and that the aggregate damages sustained by the class may not be as great as plaintiffs claim. Nevertheless, the district judge is in the best position to make a determination of manageability and has considerable discretion in doing so. Modern computer technology can bring formerly insurmountable tasks within the range of manageability. If, on the other hand, unmanageability should develop or facts should arise which indicate that class treatment is inappropriate, the district judge can reassess the procedures to be employed and can even reconsider the class action designation. *Parkinson v. April Industries, Inc., supra,* 520 F. 2d at 653; *General Motors Corp. v. City of New York, supra,* 501 F. 2d at 647; *Green v. Wolf Corp.,* 406 F. 2d 291, 298 (2d Cir. 1968), *cert. denied,* 395 U. S. 977 (1969); Rule 23(c)(1), Fed. R. Civ. P. Judge Griesa specifically noted that his determination was a provisional one.

Accordingly, we affirm the provisional designation of the suit as a class action but reverse the order imposing on the defendant Fund the costs of extracting from computer tapes the names and addresses of the class members.

HAYS, *Circuit Judge* (dissenting in part):

I concur in the majority's holding that the order below is appealable and the granting of class action status proper. I respectfully dissent, however, from the reversal of the district court order directing defendant Oppenheimer Fund, Inc. ("the Fund") to cull out the names of class members from the Fund's computer tapes at the Fund's expense. The majority's decision, ostensibly predicated on the Supreme Court's decision in *Eisen v. Carlisle & Jacquelin (Eisen IV),* 417 U. S. 156 (1974), uncritically treats a discovery issue as notice and indiscriminately applies a rule appropriate to arms-length relationships to the fiduciary relationship between the parties herein. An elaboration of the particular facts attending this suit is fundamental to understanding the nature of the action and my disagreement with the panel's holding.

Defendant Fund is an open-end diversified investment fund registered under the Investment Company Act of 1940, 15 U. S. C. §§ 80a-1 *et seq.* Defendant Oppenheimer Management Corporation ("the Manager") manages the Fund's investment portfolio and, pursuant to an Investment Advisory Agreement, receives compensation calculated as a percentage of the Fund's net asset value. Defendant Oppenheimer & Co. ("the Broker") is a brokerage firm owning approximately 82% of the outstanding stock of the Manager and 100% of the voting stock. The individual defendants are all directors of the Fund, some of whom also hold offices or directorships or partnership interests in the Manager and/or Broker. The Manager has the right to act as exclusive distributor and sole principle underwriter of Fund shares. Shares are sold to the public at a price equal to net asset value plus a sales charge.

This consolidated suit involves stockholder derivative and class action claims. The class, as certified by the dis-

trict court, is composed of all persons who purchased Fund shares between March 28, 1968 and April 24, 1970. The complaint alleges that the defendants violated the federal securities laws by failing to disclose material information to investors. The gravamen of the damage claims is that restricted securities purchased by the Fund were overvalued and, consequently, the net asset value of the Fund was overstated. Overstatement of net asset value, in turn, caused an overvaluation of Fund shares being sold to the public during the relevant period and, because the Fund-Manager fee arrangement was geared to net asset value, caused the Fund to pay inflated fees to the Manager.

As the majority apparently recognizes, the Supreme Court's *Eisen IV* decision is not dispositive of the issue of the allocation of costs of identification in the context herein. *Eisen IV* construed the *notice* requirements of Rule 23(c)(2), which apply to class actions maintained under Rule 23(b)(3), in the context of a case wherein "the relationship between the parties is truly adversary," *Eisen IV, supra* at 178-79, and held that "[t]he usual rule is that a plaintiff must initially bear the cost of notice to the class." *Id.* at 178. In the instant case, in contrast, we deal not with notice costs—a burden plaintiffs herein willingly assume—but with class member identification costs, and we deal not with the usual rule applicable to truly adversarial relationships, but with a rule as to which the Supreme Court took pains to express no opinion—the rule which governs in "situations where a fiduciary duty pre-existed between the plaintiff and defendant. . . ." *Id.* Both of these distinctions merit pause before we rush to close yet another door to the class action procedure.

In *Eisen IV* the Supreme Court held that in a Rule 23(b)(3) class action the cost of notice, *i.e.*, the letter, envelope, stuffing, and postage is, in the usual case, the

responsibility of the plaintiff "as part of the ordinary burden of financing his own suit." *Eisen IV, supra* at 179. The opinion properly construed requires only that the litigation expense of notice be borne by plaintiff. It does not require, and surely the Supreme Court did not intend, that *all* litigation expenses, contrary to established rules and practice, are to be hereinafter the plaintiff's responsibility. When identification is sought information allowing a party to proceed with his suit is at the core of the request. Thus, in purpose and effect such a request is not different in kind from other requests for information routinely made during discovery. That a suit will be unable to proceed absent identification does not vitiate the validity of characterizing identification as a product ascertainable by discovery and governed by the rules applicable thereto. A contrary view clearly is belied by the common practice of establishing jurisdiction by means of discovery.

Rule 34 governs the production of computerized information, making discoverable, *inter alia,* "data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form. . . ."[1] As noted by S. C. Wright and A. Miller, Federal Practice and Procedure § 2218 at 659 (1970):

> "The responding party who is required to prepare a printout or otherwise make the data reasonably usable for the discovering party must ordinarily bear the expense of doing this. He can shift the cost to

1. It is somewhat disingenuous to focus, as the majority does, on Rule 33 which governs interrogatories rather than the Rule more specifically designed to govern computerized information. Since the disclosing party has opted to keep his records on computer tapes, there is good reason to allow the district court the usual discretion as to costs of retrieving information from those tapes lest discovery be obstructed by irretrievably burying information to immunize business activity from later scrutiny.

> the discovering party only on a showing under Rule 26(c) that justice so requires in order to protect himself from 'undue burden or expense.'" (footnote omitted)

While the authors suggest that courts should be sensitive to the expense involved since the disclosing party may be obliged "to engage in fairly sophisticated electronic manipulation and analysis," *id.*, expense remains an issue properly resting within the sound discretion of the district judge. Under the facts of this particular case the district judge did not consider the costs of processing the defendant's tapes an "undue burden or expense." It is not our practice to disturb the discretionary judgment of a district court in the realm of discovery absent a showing of abuse, *see, e.g., Baker v. F&F Investment*, 470 F. 2d 778 (2d Cir. 1972), *cert. denied*, 411 U. S. 966 (1973); *H. L. Moore Drug Exchange, Inc. v. Smith, Kline & French Laboratories*, 384 F. 2d 97 (2d Cir. 1967), and discovery of class members should provide no exception. Imposing the cost of culling out the names of members of the class upon the Fund involved no abuse of discretion. The district court, finding this expense attributable to defendants' objections to plaintiffs' efforts to define a subclass minimizing expenses, *cf. Eisen IV, supra* at 179, n. 16, did not commit reversible error in refusing to shift this burden to plaintiffs. Moreover, the order below specifically notes that it is "without prejudice to the right of this defendant [the Fund], at the conclusion of the action, to make whatever claim it would be legally entitled to make regarding reimbursement by another party."

Assuming, *arguendo*, that the majority is correct in failing to distinguish identification from notice, reversal of the district order is neither compelled by *Eisen IV* nor an advisable extension of that case. As we noted in *Eisen*

v. Carlisle & Jacquelin, 470 F. 2d 1005, 1009 n. 5 (2d Cir. 1973) [2] *("Eisen III")* and the Supreme Court noted in *Eisen IV*, the usual rule that the representative plaintiff must bear the cost of notice may not apply "where a fiduciary duty pre-existed between the plaintiff and defendant. . . ." *Eisen IV, supra* at 178. The instant appeal squarely raises the issue, heretofore undecided, of whether notice costs may properly be imposed upon a defendant when the relationship of the parties is truly fiduciary. I would hold that they may.

Unquestionably the relationship between Fund shareholders and the defendants herein is of a fiduciary nature. As one court has observed, the Investment Company Act "impose[s] fiduciary obligations of the highest order upon persons who control investment companies." *Securities and Exchange Commission v. Advance Growth Capital Corp.*, 470 F. 2d 40, 55 n. 21 (7th Cir. 1972). *See*, Invest-

2. The footnote, in pertinent part, states:

"Nor did we decide or intend to say [in *Eisen II*, 391 F. 2d 555 (2d Cir. 1968)] that in all cases or under all circumstances plaintiffs in class actions are or must be required to defray the cost of giving the various notices specified in amended Rule 23. This is an action to recover money damages for alleged violations of Section 4 of the Clayton Act and Section 6 of the Securities and Exchange Act of 1934. It is not a derivative stockholder's action asserting a cause of action in favor of a defendant corporation, which regularly sends communications to all the stockholders and may be said to owe its stockholders certain fiduciary duties, nor a case where a public utility corporation which regularly sends monthly bills to its current customers has been held to have overcharged its customers and the class suit is brought to compel a refund. There may be other similar examples of class actions in which, depending on the circumstances of particular cases, courts might find justification for holding that a representative plaintiff was not obligated to defray the cost of giving the notices required by amended Rule 23. We do not attempt any enumeration. It must be recalled that the provisions for notice in amended Rule 23 were intended to comply with constitutional requirements. See Advisory Committee's Note, 39 F. R. D. 69, 107."

ment Company Act of 1940, 15 U. S. C. § 80a-35. So too, "[t]he Investment Advisors Act of 1940 . . . reflects a congressional recognition 'of the delicate fiduciary nature of an investment advisory relationship. . . .'" *Securities and Exchange Commission v. Capital Gains Research Bureau, Inc.*, 375 U. S. 180, 191 (1963), *quoting* 2 Loss, Securities Regulation (2d ed. 1961) at 1412. It is the breach of these fiduciary duties which is at the core of this suit.

When the defendants assumed their positions with the Fund they knew, or clearly should have known, that the law imposes very strict standards upon their conduct. Their relationship to the plaintiff class is one of trust; the entire scheme of our investment company and advisor regulation is predicated upon that trust being respected inviolate. A breach of a fiduciary duty traditionally has been considered a much graver transgression than, for example, breach of a contractual duty. Thus, as the majority notes, the Supreme Court in *Eisen* "refused to foreclose the possibility" of allocating notice costs where there exists a fiduciary duty between the parties and their relationship is not truly adversarial. Absent such a special relationship and without support under Rule 23, the Supreme Court found no justification for deviating from the usual rule that a plaintiff must bear notice costs. In cases involving fiduciaries, however, the usual rules traditionally have been modified to insure that the trust relationship is not abused. The norms appropriate in the context of arms-length bargaining are simply inapposite in the fiduciary context. Thus, the usual rule should not apply to preclude class action when to do so creates a serious potential for insulating fiduciary breaches from redress. I would affirm the district court.